2-1-492

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~368~~. 58

THE BUFFALO AND ERIE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF PENNSYLVANIA.

IN ERROR TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

FILED DECEMBER 13, 1872.

Oct. T. 1872

SUPREME COURT OF THE UNITED STATES.

No. 368.

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vs.

THE COMMONWEALTH OF PENNSYLVANIA.

IN ERROR TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

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1 The answer of the justice of the supreme court of Pennsylvania to the writ of error from the Supreme Court of the United States, hereunto annexed, as follows, to wit:

2 Specifications of objection to the settlement of the auditor-general and State treasurer of Pennsylvania against the Buffalo and Erie Railroad Company.

In the matter of the account settled by the auditor-general and State Treasurer of the Commonwealth of Pennsylvania, between said Commonwealth and the Buffalo and Erie Railroad Company, for tax claimed by said Commonwealth for the half year ending December 31, 1868, and the half year ending June 30, 1869, on gross receipts under the provisions of the act of May 1, 1868.

The said The Buffalo & Erie Railroad Company appeals from said settlement to the court of common pleas of Dauphin County, Pennsylvania, and specifies the following objections to said settlement:

1. The said tax is levied and settled upon the aggregate of gross receipts of said company for the year embraced in said settlement, amounting to the sum of $2,270,070.85, only $24,353.87 of which sum was received from the transportation of freight, passengers, mails, and miscellaneous articles taken up and laid down within said State of Pennsylvania, and no greater amount of the gross receipts of said company than the last-named sum can be taxed by said State without violating the Constitution of the United States.

2. Of the amount of gross receipts of said company upon which said tax is levied and settled, the sum of $2,144,865.88 was received by said company for the transportation of freight, passengers, mails, &c.,

3 in a continuous course of transportation from points without the State of Pennsylvania to & through the northwest corner of said State to other points without said State, which freight, passengers, mails, &c., were destined and carried from one State other than Pennsylvania to another State other than Pennsylvania, and were neither received nor delivered in Pennsylvania, and therefore in taxing such receipts said settlement, and the law under which it is made, is repugnant to the fourth paragraph of the eighth section of the first article of the Constitution of the United States, which provides that Congress shall have power to regulate commerce with foreign nations and among the several States; and with the second paragraph of the tenth section of the first article of the Constitution of the United States, which provides that no State shall, without the consent of Congress, lay any imposts or duties on imports or exports except what may be absolutely necessary for executing its inspection laws; and said tax and said law are therefore unconstitutional, null, and void.

3. Of the amount of gross receipts of said company, upon which said tax is levied and settled, the sum of $100,857.39 was received by said company from the transportation of freights, passengers, mails, &c., from points without the State of Pennsylvania to points within said State, or from points within said State to points without the same, & no part thereof was received from the transportation of freight, passengers, mails, &c., both received & delivered within said State,

4 & therefore, in taxing said receipts, said settlement and said act under which it is made are repugnant to the parts of the Constitution of the United States set forth and referred to in the preceding specification, and are therefore unconstitutional and void.

4. The said settlement and the law under which it is made, in so far as they impose the said tax upon the gross receipts of the said company derived from the transportation of freight, passengers, or mails through

Pennsylvania or out of Pennsylvania, into any other State or out of any other State into Pennsylvania, are repugnant to and at variance with the letter and spirit of the Constitution of the United States, and hence unconstitutional, null, and void.

5. The said tax cannot be collected from said company, because it was on the 16th day of August, A. D. 1869, merged in the Lake Shore & Michigan Southern Railway Company, & thenceforth ceased to exist, prior to the settlement herein appealed from.

Witness the seal of the Lake Shore and Michigan Southern Company properly attested the 2d day of June, A. D. 1870.

{ SEAL OF LAKE SHORE & MICH- } H. T. CLARK,
{ IGAN SOUTHERN RAILWAY CO. } *Pres't Lake Shore & Mich. Southern R'way Co.*

Attest: **GEO. B. ELY**, *Sec'ty.*

5 (Endorsement on specifications of objection:)

No. 235, August term, 1870. Commonwealth vs. Buffalo & Erie Railroad Co. Specifications of objection to settlement.

Received at office of the auditor-general June 10th, 1870.

Appeal bond.

Know all men by these presents that we, The Buffalo and Erie Railroad Company, now the Lake Shore and Michigan Southern Railroad Company, and H. B. Payne and George B. Ely, are held and firmly bound unto the Commonwealth of Pennsylvania in the sum of eight thousand dollars, lawful money of the United States, to be paid to the said Commonwealth, her certain attorney, or assigns; to which payment, well and truly to be made, we do bind ourselves, our respective successors, executors, and administrators, jointly and severally, firmly by these presents, sealed with the corporate seal of said company, and with the seals of the said individual obligors, & dated the 10th day of June, A. D. 1870.

The condition of this obligation is such, that whereas the said above-bounden company has appealed to the court of common pleas of Dauphin County from the settlement of the auditor-general and State treasurer of said Commonwealth for tax on gross receipts for the half years ending December 31, 1868, and June 30, 1869, against said railroad company: Now, if said company shall prosecute said appeal with effect, and shall pay all costs and charges which the court or arbitra-
6 tors shall award, and shall also pay any sum of money which shall appear, by the judgment of said court or award of arbitrators, to be due by said company to the said Commonwealth, then this obligation to be void; otherwise to remain in full force and virtue.

The Lake Shore & Michigan Southern Railway Company,

{ SEAL OF THE LAKE SHORE & MICH. } By J. H. DEVEREUX,
{ SOUTHERN RAILWAY CO. } *General Manager.*

H. B. PAYNE. [SEAL.]
GEO. B. ELY. [SEAL.]

Signed, sealed, and delivered in presence of us:
N. BARTLETT,
E. C. SHELDON.

Attest: GEO. B. ELY, *Sec'ty.*

(Endorsement on bond :)

No. 235, August 3, 1870. Commonwealth vs. Buffalo & Erie Railroad Co. Bond on appeal. Filed June 14, 1870.

June 13, 1870. The within bond presented and approved by me.

JNO. J. PEARSON,
Pres't Judge.

7 *Buffalo & Erie Railroad Company in account with the Commonwealth of Pennsylvania,* Dr.

For tax on gross receipts, per act of May 1, 1868, for half years ending December 31st, 1868, and June 30, 1869, as per report herewith filed :

Gross receipts to Dec. 31, 1868, $1,164,712$\frac{08}{100}$. Tax $\frac{3}{4}$ of one per cent. on $244,854$\frac{22}{100}$ or $\frac{37}{176}$ parts of the above sum representing proportion of road in Penn'a	$1,836 41
Interest from Feb'y 1, 1869, to Ap'l 1, 1870	257 09
Gross receipts to June 30, 1869, $1,105,358$\frac{77}{100}$. Tax $\frac{3}{4}$ of one per cent. on $232,376.40 or $\frac{37}{176}$ parts of entire receipts....	1,742 82
Interest from Aug. 1, 1869, to Ap'l 1, 1870, (12%).....	139 42
Due Commonwealth :.....	3,975 74

AUDITOR-GENERAL'S OFFICE,
Harrisburg, Ap'l 8, 1870.

Settled and entered :

SEAL OF AUDITOR-GENERAL OF P'A.

D. C. MAURER,
For J. F. HARTRANFT,
Auditor-General.

TREASURY OFFICE, P'A,
Harrisburg, Ap'l 12, 1870.

Approved :

THO. NICHOLSON,
For R. W. MACKEY,
State Treasurer.

AUDITOR-GENERAL'S OFFICE,
Harrisburg, Ap'l 13, 1870.

I hereby certify that the above is a true copy of the original remaining on file in this department.

Witness my hand and the seal of office, the day and year aforesaid.

D. C. MAURER, for
Auditor-General.

GEO. H. CHASE, Tr.,
Buffalo, N. Y.

8 In Dauphin common pleas, No. 235, Aug. term, 1870.

DAUPHIN COUNTY, *ss :*

The Commonwealth of Pennsylvania, by her attorney-general, complains of the Buffalo & Erie Railroad Company, of a plea, that they render unto the said Commonwealth the sum of one hundred thousand dollars, lawful money of the United States, which they owe to and unjustly

detain from her. For that whereas the said defendants, on the eighth day of April, A. D. 1870, at the county of Dauphin aforesaid, were indebted to the said plaintiff, in the sum of three thousand nine hundred and seventy-five and $\frac{74}{100}$ dollars, lawful money of the United States, on an account examined, adjusted, settled, and signed by the auditor-general of this Commonwealth, and duly entered in the books of his office, as authorized and required by law, on the day and year last aforesaid, in which a certain sum of money, to wit, the sum last aforesaid, is due and owing the said plaintiff from the said defendants, with interest thereon at the rate of twelve per centum per annum, from and after the expiration of one month from the day upon which the said account was so as aforesaid examined, adjusted, settled, and signed by the auditor-general of this Commonwealth, for tax on gross receipts as per act of May 1, A. D. 1868, for the half years ending Dec. 31, 1868, & June 30, A. D. 1869, which said account was, on the 12th day of Ap'l, A. D. 1870, submitted to, revised, and approved by the State treasurer, and a copy thereof, within thirty days thereafter, sent by the said auditor-general, under his hand and seal of office, to the said defendants, and which yet remains in full force against the said defendants and unappealed from. Whereby, and by force of the statute in such case made and provided, an action hath accrued to the said plaintiff to demand and have of and from the said defendants a certain sum of money, to wit, the sum mentioned and ascertained to be due to this Commonwealth, in the said account so as aforesaid examined, adjusted, settled, and signed by the auditor-general of this Commonwealth, parcel of the said sum above demanded. And being so indebted, the said defendants afterwards, to wit, on the day and year aforesaid, at the county aforesaid, promised to pay to the said plaintiff, on request, the last-mentioned sum of money.

And whereas, also, the said defendants, on the day and year in the first count first mentioned, at the county aforesaid, were indebted to the said plaintiff in a certain further sum of money, to wit, the sum mentioned and ascertained to be due to this Commonwealth, in the said account in the first count mentioned, for money then and there had
9 and received by the said defendants, to and for the use of the said plaintiff. And, also, a certain further sum of money, to wit, the sum last aforesaid, on an account settled and entered by the auditor-general of this Commonwealth, against the said defendants, on the day and year in the first count mentioned, for tax on capital stock, and approved by the State treasurer on the day and year in the first count mentioned.

And whereas, afterwards, to wit, on the day and year last aforesaid, at the county aforesaid, the said defendants, in consideration of the premises, promised to pay the two last-mentioned several sums of money respectively to the said plaintiff on request, yet the said defendants have disregarded their said promises, and although often requested so to do have not as yet paid any of the said several sums of money or any part thereof, to the damage of the said plaintiff of one hundred thousand dollars, and therefore she brings suit, &c.

J. M. McCLURE.
F. CARROLL BREWSTER,
Attorney-General.

(Endorsed:) No. 235, Aug. term, 1870. Commonwealth of Pennsylvania vs. The Buffalo & Erie Railroad Company. Narr. and copy of account. Filed June 16, 1870.

10 In the court of common pleas of Dauphin County.

THE COMMONWEALTH OF PENNSYLVANIA
vs.
THE BUFFALO & ERIE R. R. CO. } No. 325. Aug. T., 1870.

OCT. 10, 1870.

Defendant pleads nil debit & payment with leave.
Simonton for def't.

11 In the court of common pleas of Dauphin County, Penn'a. August T., 1870. No. 235.

THE COMMONWEALTH OF PENNSYLVANIA
vs.
THE BUFFALO & ERIE RAILROAD COMPANY.

Notes of trial and charge of court.

J. Mont. Forster sworn: "This is the return of defendant made in this case." Return read dated August 24, 1869; gross receipts as follows:

12 STATE OF NEW YORK, COUNTY OF ERIE,
City of Buffalo, ss:

George H. Chase, being duly sworn, deposes and says that he resides in the city of Buffalo, county of Erie, and State of New York, and is the secretary and treasurer of the Buffalo & Erie Railroad Company, a line of railroad extending from the said city of Buffalo to the city of Erie in the State of Pennsylvania, and that he has full charge of the receipts of said railroad as such secretary and treasurer; that for the half year commencing on the first day of July, 1868, and ending on the 31st day of December, 1868, the gross receipts of said road amounted to the sum of one million one hundred and sixty-four thousand seven hundred and twelve dollars and eight cents, and that the gross receipts of said road from the first day of January, 1869—being one-half year—amounted to the sum of one million one hundred and five thousand three hundred and fifty-eight dollars and seventy-seven cents; and further deponent saith not.

GEO. H. CHASE.

Subscribed and sworn to before me this 24th day of August, A. D. 1869.
[SEAL.]

THO'S BATH,
Comm'r of Deeds for Buffalo.

13 STATE OF NEW YORK, ERIE COUNTY, *Clerk's Office, ss:*

[SEAL.] I, John H. Andrews, clerk of said county and of the courts thereof, the same being courts of record, certify that Tho's Bath, before the annexed affidavit was taken, and whose name is subscribed in the certificate of proof thereof, was, at the time of taking the same, a commissioner of deeds for the city of Buffalo, in the said county, duly sworn and acting as such, and authorized to take the same; and further, that I am well acquainted with his handwriting, and verily believe the signature thereto to be his genuine signature.

In testimony whereof I have hereunto set my hand and affixed the seal of said county and the courts thereof the 24th day of August, A. D. 1869.

JOHN H. ANDRUS,
Clerk.

AUDITOR-GENERAL'S OFFICE,
Harrisburg, Dec. 7, 1870.

I hereby certify that the within is a true copy of the original remaining on file in this department.

Witness my hand and the seal of office the day and year aforesaid.

[SEAL.] D. C. MAURER,
For Auditor-General.

(Endorsed:) Buffalo & Erie Railroad Co. Gross receipts. Filed Aug. 26, 1869.

14 Settlement read, dated Ap'l 12, 1870, as follows: (Copy.)

Buffalo & Erie Railroad Company in account with the Commonwealth of Pennsylvania, Dr.

For tax on gross receipts, per act of May 1, 1868, for half years ending Dec. 31st, 1868, and June 30th, 1869, as per report herewith filed:

Gross receipts to Dec. 31, 1868, $1,164,712 $\frac{05}{100}$. Tax $\frac{3}{4}$ths of one per c't. on $244,854 $\frac{22}{100}$, or $\frac{37}{176}$ parts of the above sum representing proportion of road in Penn'a	$1,836 41
Interest from Feb. 1, 1869, to Ap'l 1, 1870	257 09
Gross receipts to June 30th, 1869, $1,105,358 $\frac{77}{100}$. Tax $\frac{3}{4}$ths of one per c't. on $232,376.40, or $\frac{37}{176}$ parts of entire receipts	1,742 82
Interest from Aug. 1, 1869, to Ap'l 1870	139 42
Due Commonwealth	3,975 74

AUDITOR-GENERAL'S OFFICE,
Harrisburg, Ap'l 8, 1870.

Settled and entered:
SEAL OF AUD. GEN'L.
D. C. MAURER,
For J. F. HARTRANFT,
Auditor-General.

TREASURY OFFICE, P'A,
Harrisburg, Ap'l 12, 1870.

Approved:

THO. NICHOLSON,
For R. W. MACKEY,
State Treasurer.

AUDITOR-GENERAL'S OFFICE,
Harrisburg, Dec. 7, 1870.

I hereby certify that the above is a true copy of the original remaining on file in this department.

Witness my hand and the seal of office the day and year aforesaid.

D. C. MAURER,
For Auditor-General.

GEO. H. CHASE, Tr., *Buffalo, N. Y.*

Witness: "The settlement was delayed to give defendants an opportunity to make discrimination, which they never did."

Cross-examined: "I never called on them to make a new return discriminating."

Plaintiff closes.

Defense.

Specifications read by way of defense, filed June 10, 1870, as follows:

In the matter of the account settled by the auditor-general and State treasurer of the Commonwealth of Pennsylvania, between said Commonwealth and the Buffalo & Erie Railroad Company, for tax claimed by said Commonwealth for the half year ending Dec. 31, 1868, and the half year ending June 30, 1869, on gross receipts, under the provisions of the act of May 1, 1868.

The said The Buffalo & Erie Railroad Company appeals from said settlement to the court of common pleas of Dauphin County, Pennsylvania, and specifies the following objections to said settlement:

1. The said tax is levied and settled upon the aggregate gross receipts of said company for the year embraced in said settlement, amounting to the sum of $2,270,070.85, only $24,353.57 of which sum was received from the transportation of freight, passengers, mails, and miscellaneous articles taken up and laid down within said State of
16 Pennsylvania, and no greater amount of the gross receipts of said company than the last-named sum can be taxed by said State without violating the Constitution of the United States.

2. Of the amount of gross receipts of said company upon which said tax is levied and settled, the sum of $2,144,865.88 was received by said company for the transportation of freight & passengers, mails, &c., in a continuous course of transportation from points without the State of Pennsylvania to & through the northwest corner of said State to other points without said State, which freight, passengers, mails, &c., were destined and carried from one State other than Pennsylvania to another State other than Pennsylvania, and were neither received nor delivered in Pennsylvania, and, therefore, in taxing such receipts said settlement, and the law under which it is made, is repugnant to the fourth paragraph of the eighth section of the first article of the Constitution of the United States, which provides that Congress shall have power to regulate commerce with foreign nations and among the several States; and with the second paragraph of the tenth section of the first article of the Constitution of the United States, which provides that no State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws, and said tax and said law are therefore unconstitutional, null, and void.

17 3. Of the amount of gross receipts of said company upon which said tax is levied and settled the sum of $100,857.39 was received by said company for the transportation of freight, passengers, mails, &c., from points without the State of Pennsylvania to points within said State, or from points without the same, and no part thereo, was received for the transportation of freight, passengers, mails, &c., both received & delivered within said State, and, therefore, in taxing said receipts said settlement and said act under which it is made are repugnant to the parts of the Constitution of the United States set forth and referred to in the preceding specification, and are, therefore, unconstitutional, null, and void.

4. The said settlement and the law under which it is made, in so far

as they impose the said tax upon the gross receipts of said company, derived from the transportation of freight, passengers, or mails through Pennsylvania, or out of Pennsylvania into any other State, or out of any other State into Pennsylvania, are repugnant to and at variance with the letter and spirit of the Constitution of the United States, and hence unconstitutional, null, and void.

5. The said tax cannot be collected from said company because it was on the 16th day of August, A. D. 1869, merged in the Lake Shore and Michigan Southern Railway Company, and thenceforth ceased to exist prior to the settlement herein appealed from.

18 Witness the seal of the Lake Shore and Michigan Southern Company, properly attested the 2d day of June, A. D. 1870.

{ SEAL OF LAKE SHORE & MICH. SOUTHERN R'D CO. }

H. T. CLARK,
Pres't Lake Shore & Michigan Southern R'way Co.

Attest:

GEO. B. ELY,
Sec't'y.

Statement read by consent, discriminating as to the different sources of gross receipts. Report of the cashier of the company to the treasurer thereof, dated May 17, 1870, as follows:

19 LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY.

CASHIER'S OFFICE,
Buffalo, N. Y., May 17, 1870.

GEORGE B. ELY, Esq., *Ass't Treas., &c., Cleveland, O.:*

DEAR SIR: Below I give you the several classes of receipts required on gross-receipt report, for six months ending Dec'r 31st, 1868, and for the six months ending June 30th, 1869.

From July 1st to Dec'r 31st, 1868, both inc.

Pass'r receipts originating within and delivered within State Penn'a		$7,539 46
Do. origin'g within and delivered without State Penn'a.		12,718 86
Do. origin'g without and delivered within State Penn'a.		14,358 06
Do. passing through State P'a		425,007 23
Total pass'r receipts		$459,623 61
Freight receipts originating within & del'd within State Penn'a		2,691 29
Do. originating within & deliv'd without State Penn'a		14,869 47
Do. originating without & deli'd within State Penn'a		5,192 55
Do. passing through ....do		638,420 51
Total freight receipts		661,173 82
Mail & missel. receipts originating within & del'd within State P'a	3,037 24	
Do. originating within & del'd without State Penn'a	3,037 24	
20 Do. originating without & delivered within State Penn'a	3,037 25	
Do. passing through State P'a	34,229 44	
Total mail & missel. receipts		43,341 17

Telegraph receipts originating within & del'd within State P'a	40 30		
Do. originating within & del'd without State of Penn'a	40 30		
Do. originating without & del'd within State Penn'a	40 30		
Do. passing through State Penn'a	452 58		
Total telegraph receipts			573 48
Gross receipts for the 6 mos			$1,164,712 08

January 1st, 1869, to June 30th, 1869, both inc.

Pass'r receipts originating within and del'd within State Penn'a	5,535 08		
Do. originating within and del'd without State Penn'a	9,282 68		
Do. originating without & del'd within State Penn	10,349 30		
Do. passing through State P'a	303,024 49		
Total pass'r receipts			328,191 55
Freight receipts originating within & del'd within State Penn	2,404 25		
Do. originating within & del'd without State Penn'a	16,105 39		
Do. originating without and deld. within State Penna	5,608 10		
Do. passing through State P'a	708,731 19		
Total freight receipts			732,848 93
Mail & missel. receipts originating within & del'd within State Pa	3,071 17		
Do. originating within and del'd without State Penn'a	3,071 17		
21 Mail, &c., originating without & del'd within State Penn'a	3,071 17		
Do. passing through do	34,608 29		
Total mail and missel. receipts			43,821 80
Telegraph receipts originating within & del'd within State P'a	34 78		
Do. originating within & del'd without State P'a	34 78		
Do. originating without and del'd within State P'a	34 78		
Do. passing through State P'a	392 15		
Total telegraph receipts			496 49
Gross receipts for six months			$1,105,358 77

The totals agree with report made by Mr. Chase. The mail & missel. & tel'g'h receipts are pro rated per mile, as no other way could be found. This, however, is according to the law of P'a.

Yours, resp'f'y,

H. L. LYMAN, *Cashier.*

Defendant closes.

Plaintiff read act of May 1, 1868, section 8, as follows:

22 * * * * * * *

SECTION 8. That in addition to the taxes provided for as aforesaid, every railroad, canal, and transportation company liable to tax upon tonnage, under the preceding section of this act, shall pay to the Commonwealth a tax of three-fourths of one per centum upon the gross receipts of said company; the said tax shall be paid semi-annually, upon the first days of July and January, and for the purpose of ascertaining the amount of the same, it shall be the duty of the treasurer or other proper officer of said company to transmit to the auditor-general, at the dates aforesaid, a statement under oath or affirmation, of the amount of gross receipts of the said company derived from all sources during the preceding six months; and if any such company shall neglect or refuse, for a period of thirty days after such tax becomes due, to make said return, or to pay the same, the amount thereof, with an addition of ten per centum thereto, shall be collected for the use of the Commonwealth, as other taxes are recoverable by law from said companies: *Provided*, That the revenue derived under this section shall be applied to the payment of principal and interest of the debt contracted under the act of the fifteenth of May, anno Domini one thousand eight hundred and sixty-one, entitled "An act to create a loan and to provide for arming the State."

Plaintiff closes.

23 *Charge of the court.*

The accounting department charged the defendant with a tax on its gross receipts, under the 8th section of the act of May 1st, 1868. The settlement was predicated on the report made by the treasurer of the corporation on the 24th day of August, 1869, who failed to designate the sources from which the receipts were derived. Consequently the department would presume all to be legal and valid. The account was settled on the 12th of April, 1870. On the following 17th of May a statement was made out by the cashier showing how much money was received from business done solely in the State of Pennsylvania, that for transportation to and from the State, and also on transit through the State. This will all be fully understood by a reference to that report. The whole length of the road from Buffalo to Erie is, as we understand, eighty-eight miles; eighteen and one-half of which is within the State of Pennsylvania, the residue in the State of New York. The tax is charged to the company in proportion to its length in this State. No objection is taken to the tax for money received for transportation where the traffic was solely in this State. The corporation contends that it is not liable to a tax on freight where the transportation commenced within, but terminated and was originally destined to terminate without; or commenced without and was destined for points within the State, and it most emphatically objects to being taxed with its gross receipts for through traffic; that passing through and not intended to stop in Pennsylvania. We have already expressed our opinion fully as to taxes so imposed on the tonnage

24 carried on railroads and canals where the freight was originally destined for points beyond our borders, also that the State could not impose a tax on persons or commodities on transit through it; that such a tax was in effect a regulation of commerce between the States, and came in conflict with the Constitution of the United States. We still retain that opinion, but have yielded to and followed that of

the supreme court of Pennsylvania, and shall continue so to do until a different rule is established by the Federal judiciary. Our decision in the case of the Commonwealth vs. the Erie Railway Company, that through tra'fic could not be taxed, has been acquiesced in both by the officers of the law and the accounting department. The only question here is as to the distinction between the gross receipts from that branch of business by a Pennsylvania corporation and the tax on each ton of goods carried. Although the effect may be much the same on the commerce between the States, and like inconvenience follow if the tax is carried to excess, yet there is a manifest difference in the form of the law and the person on whom the burden is intended to fall. In the act imposing a tax on tonnage it is provided that the corporation carrier may exact it from the transporter in addition to the toll or freight which the company is authorized to take, whereas on the gross receipts of the road it is directly imposed on the corporation itself, not expected to be paid by the transporter; is more in the nature of an income tax. The State has an undoubted right to tax the corporations of its own creation, & such as are occupying its soil, protected by its
25 laws, and doing business within its borders. We know not why the profits or net income of such companies should not be taxed, and certainly their property can be, in proportion to its value; that on gross receipts is more objectionable in principle, because the company carrying may make no profits, but sustain a loss unless it adds the charge to its customers. We consider that it comes within the power of the State, but it is on the very border of constitutional inhibition. Such a tax carried to excess might prevent the free passage of persons or property through the State, might amount to an exclusion or prohibition, which it never was intended that any State should inflict on the citizens of other States. Every tax imposed on a carrying corporation is some burden on commerce, but it is not to be rejected or declared invalid on that account; it is only when assessed on the commodity carried, or is of such a character as tends to prevent the free passage of persons or property through the State. We see nothing erroneous in the settlement appealed from. Your verdict will therefore be rendered for the amount thereof, with interest at the rate of 12 per cent. per annum after two months from the date of settlement. This, with the answers to the points, covers every legal question raised.

To this charge and the answers to the points of defendants counsel did except, and exception sealed at his request.

JNO. J. PEARSON. [SEAL.]

26 *Defendant's points.*

The court is respectfully requested to charge the jury as follows:

1. That the eighth section of the act of May 1, 1868, under which the settlement of the tax claimed in this case was made, in so far as attempts or was intended to impose a State tax on so much of the gross receipts of the defendant as were received for the transportation of freight, passengers, mails, or miscellaneous articles in a continuous course of transportation from any point within the State of Pennsylvania to any point in any other State or foreign country, or from any point within any other State or foreign country into the State of Pennsylvania, is unconstitutional and void, because repugnant to that part of the Constitution of the United States which provides that Congress shall have the power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes; and also to that part of the said Constitu-

tion which provides that no State shall, without the consent of Congress, lay any impost or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and also to the letter and spirit of said Constitution, and its true intent and meaning.

2. That said section of said act, under which the settlement of the tax claimed in this case was made, in so far as it attempts or was intended to impose a State tax on so much of the gross receipts of de-
27 fendants as were received from the transportation of freight, passengers, mails, or miscellaneous articles in a continuous course of transportation from any point within any other State or foreign country into and through the State of Pennsylvania, into any other of the United States, or any foreign country, is unconstitutional and void, because repugnant to that part of the said Constitution first above referred to, and also to that part of said Constitution second above referred to, and also to the spirit and intent of the said Constitution.

3. That said sections of said act, in so far as it attempts or was intended to impose a State tax upon so much of the gross receipts of defendant as were not derived from the transportation of freight, passengers, mails, & miscellaneous articles from one point within this State to another point also within this State, and from other business carried on wholly within the State, is unconstitutional and void, because repugnant to the several parts of said Constitution above referred to, and to its spirit and intent.

4. That the plaintiff can recover in this case only so much of the tax claimed as is due on that part of the gross receipts of defendant which was received from the transportation of freight, passengers, mails, & miscellaneous articles from one point within the State of Pennsylvania to another point also within said State, and from other business of defendant carried on wholly within said State.

28 5. The tax claimed in this case cannot be collected or recovered from defendant, because, on the 16th day of August, A. D. 1869, prior to the settlement of the tax claimed in this case, the company defendant was legally merged in the Lake Shore and Michigan Southern Railway Company, and thenceforth ceased to exist.

Answers to defendant's points.

First. This point answered in the negative, so far as regards the tax charged in the present settlement.

Second. This is also answered in the negative, as appears in the general charge.

Third. Negatived as per the general charge. This point is less strongly in favor of the defendant than the other two, if we may judge from the opinion of the Supreme Court in the various ton'age-tax cases.

Fourth. Answered in the negative for the reasons given in the charge and adverted to in the last point.

Fifth. The tax was due from the corporation defendant before it was connected with any other road or underwent a change of name. It could not escape from the payment of its debt to the State by such connection or change. The tax was properly charged by the department against this corporation, and we are not satisfied that there is any error in the settlement, or want of authority in the State officers to make it against this company.

29 In the court of common pleas of Dauphin County.

THE COMMONWEALTH OF PENNSYLVANIA
vs.
THE BUFFALO & ERIE RAILROAD COMPANY. } No. 235, August term, 1870.

And now, to wit, December 23, 1870, trial ordered, jury called, came, &c., twelve good and lawful men of Dauphin County, duly selected, summoned, &c., who, being all sworn or affirmed according to law, do say, December 23, 1870, that they find in favor of the plaintiff for the sum of four thousand two hundred and thirty-four dollars and thirteen cents, ($4,234.13.)

30 In the supreme court of Pennsylvania, for the middle district.

THE BUFFALO & ERIE RAILROAD COMPANY,
defendant below, plaintiff in error,
vs.
THE COMMONWEALTH OF PENNSYLVANIA,
plaintiff below, defendant in error.

Issue writ of error to the court of common pleas of Dauphin County to bring up the record and proceedings in a certain case depending therein to No. 235 of August term, 1870. Returnable to May term, 1871.

J. W. SIMONTON,
Attorney for Plaintiff in Error.

To ROB'T SNODGRASS,
Proth'y Supreme Court of Pa., Middle District.

DAUPHIN COUNTY, *ss:*

J. W. Simonton, att'y of the above-named plaintiff in error, being duly affirmed according to law, deposes and says that the writ of error in this case is not intended for delay.

J. W. SIMONTON.

Affirmed & subscribed before me this 11th day of May, 1871.
ROB'T SNODGRASS,
Prothonotary Sup. Ct. of Pa., Middle District.

(Endorsed:) Filed May 11, 1871.

31 In the supreme court of Pennsylvania, in and for the middle district, set.

SEAL OF SUPREME COURT OF PENNA., MIDDLE DISTRICT. The Commonwealth of Pennsylvania to the justices of the court of common pleas for the county of Dauphin, greeting:

Because in the record and process, and in rendering the judgment in a certain plaint, which was in our said court, before the judges of the same court, by our writ between the Buffalo and Erie Railroad Company, plaintiff in error, and the Commonwealth of Pennsylvania, (No. 235, August T., 1870,) defendant in error, as it is said, manifest error hath intervened, to the great damage of the said plaintiff in error, as by the complaint of the same plaintiff in error we have received information, we, willing that if any error be therein it should be corrected, and

that speedy justice be done to the parties in this part, do command you, that if judgment, as it is said, be rendered in the said plea, then the record and process, and all things touching the same, under your seals, distinctly and openly, you have before the justices of our supreme court of Pennsylvania, at a supreme court to be held at Harrisburg, in and for the middle district of said Commonwealth, on the third Monday of May next, and this writ, that, the record and process aforesaid being inspected, we may further cause to be done what of right and according to our laws and customs ought.

Witness the honorable James Thompson, LL. D., chief justice of our said supreme court at Harrisburg, the eleventh day of May, in the year of our Lord one thousand eight hundred and seventy-one, and of the Commonwealth the 95th.

Allowed,

ROB'T SNODGRASS,
Prothonotary.

32 The record and process, and all things touching the same, so full and entire as before us they remain, to the honorable the judges of the supreme court of the Commonwealth of Pennsylvania, sitting in and for the middle district, we certify and send as within we are commanded.

JNO. J. PEARSON. [L. S.] [L. S.] [L. S.]

(Indorsed:) No. 107, May term, 1871. Supreme court of Pennsylvania, middle district. The Buffalo & Erie Railroad Company, plaintiff in error, vs. The Commonwealth of Pennsylvania, defendant in error. Writ of error to the court of common pleas for the county of Dauphin. Returnable the third Monday of May, 1871. Rule on the defendant in error to appear and plead on the return day of the writ. "N. B.—10 days' notice to the parties or their counsel below is necessary to compel an appearance." R. Snodgrass, Proth'y. (Simonton.)

33 Among the records of the court of common pleas to August term, 1870, No. 233, it is contained as follows, to wit:

Docket entry.

THE COMMONWEALTH OF PENNSYLVANIA *vs.* BUFFALO & ERIE RAILROAD CO. } Appeal by defendant from the settlement of the auditor-general and State treasurer.

June 11, 1870, appeal and specifications of objections filed. June 14, 1870, bond filed. June 16, 1870, narr. & copy of account filed. Oct. 10, 1870, defendant pleads "nil debit;" "payment with leave." Decem. adj'd ct. 1870, (I. L.) December 23, 1870, trial ordered, jury called, came, &c., twelve good & lawful men of Dauphin County, duly selected, summoned, &c., who, being all sworn or affirmed according to law, do say, December 23, 1870, that they find in favor of the plaintiff for the sum of four thousand two hundred and thirty-four dollars and thirteen cents, ($4,234.13.) Ap'l 17, 1871, notes, points, and charge filed. May 11, 1871, writ of error from supreme court received and filed.

Dauphin County, ss. Certified from the record, Harrisburg, May 11, 1871.

{SEAL OF THE COURT OF COMMON PLEAS OF DAUPHIN COUNTY, PA.}

JOS. H. NISLEY,
Prothonotary.

34 Supreme court of Pennsylvania, middle district, May term, 1871. No. 107.

THE BUFFALO AND ERIE RAILROAD COMPANY, pl'ff in error,
vs.
THE COMMONWEALTH OF PENNSYLVANIA, def't in error.

Specification of errors in the ruling of the court below.

First. The court below erred in their answer to the first point put by plaintiff in error, which point and answer were as follows:

Point 1. "That the eighth section of the act of May 1, 1868, under which the settlement of the tax claimed in this case was made, in so far as it attempts or was intended to impose a State tax on so much of the gross receipts of the defendant as were received for the transportation of freight, passengers, mails, or miscellaneous articles in a continuous course of transportation from any point within the State of Pennsylvania to any point in any other State or foreign country or from any point within any other State or foreign country into the State of Pennsylvania, is unconstitutional and void, because repugnant to that part of the Constitution of the United States which provides that Congress shall have the power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes; and also to that part
35 of the said Constitution which provides that no State shall, without the consent of Congress, lay any impost, or duty on imports or exports, except what may be absolutely necessary for executing its inspection laws; and also to the letter and spirit of said Constitution, and its true intent and meaning."

Answer 1. "This point answered in the negative so far as regards the tax charged in the present settlement.

Second. The court erred in their answer to the second by plaintiff in error, which point and answer were as follows:

Point 2. "That said section of said act under which the settlement of the tax claimed in this case was made, in so far as it attempts or was intended to impose a State tax, on so much of the gross receipts of defendant as were received from the transportation of freight, passengers, mails, or miscellaneous articles in a continuous course of transportation from any point within any other State or foreign country into and through the State of Pennsylvania, into any other of the United States, or any foreign country, is unconstitutional and void, because repugnant to that part of said Constitution first above referred to, and also to that part of said Constitution second above referred to, and also to the spirit & intent of said Constitution."

Answer. This is also answered in the negative, as appears in the general charge.

Third. The court below erred in their answer to the third point put by plaintiff in error, which point and answer were as follows:

36 Point 3. "That said section of said act, in so far as it attempts or was intended to impose a State tax upon so much of the gross receipts of defendant as were not derived from the transportation of freight, passengers, mails, & miscellaneous articles from one point within this State to another point also within this State, and from other business carried on wholly within the State, is unconstitutional and void, because repugnant to the several parts of said Constitution above and to its spirit and intent."

Answer 3. "Negatived as per the general charge. This point is less strongly in favor of the defendant than the other two, if we may judge from the opinion of the Supreme Court in the various tonnage-tax cases."

Fourth. The court below erred in their answer to the fourth point put by the plaintiff in error, which point and answer were as follows:

Point 4. "That the plaintiff can recover in this case only so much of the tax claimed as is due on that part of the gross receipts of defendant which was received from the transportation of freight, passengers, mails, & miscellaneous articles from one point within the State of Pennsylvania to another point within said State, and from other business of defendant carried on wholly within said State."

Answer 4. "Answered in the negative, for the reasons given in the charge and adverted to in the" (answer to) "the last point."

Fifth. The court below erred in charging the jury as follows: "We see nothing erroneous in the settlement appealed from. Your

37 verdict will, therefore, be rendered for the amount thereof, with interest."

J. W. SIMONTON,
Counsel for Plaintiff in Error.

(Endorsed:) Filed May 22, 1871.

Judgment entered May 22, 1871, as follows, to wit:

And now, to wit, May 22, 1871, this cause came on to be heard, and on due consideration it is ordered that the judgment of the court below be affirmed, the court being of opinion that the eighth section of the act of the general assembly of the Commonwealth of Pennsylvania, approved the 1st day of May, 1868, entitled "An act to revise, amend, and consolidate the several laws taxing corporations, brokers, and bankers," in its application to the gross receipts of the plaintiff in error for the recovery of the tax on which suit was brought, is not in conflict with the clause of the Constitution of the United States which provides that the "Congress shall have power to regulate commerce with foreign nations, among the several States, and with the Indian tribes," nor with that clause which provides that "no State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws," and in all respects is constitutional and valid.

Per curiam

JOHN M. READ, J.

(Endorsed:) Filed May 22, 1871.

38 Among the records and proceedings of the supreme court of Pennsylvania in and for the middle district, to No. 107 of May term, 1871, it is contajned as follows, to wit:

Docket entries.

THE BUFFALO & ERIE RAILROAD COMPANY, def't below & plaintiff in error,
vs.
THE COMMONWEALTH OF PENNSYLVANIA, pl'ff below & defendant in error.

Writ of error to the court of common pleas of Dauphin County to No. 235, August term, 1870.

1871, May 11. Præcipe for writ of error and affidavit filed; same day writ of error to the court of common pleas of Dauphin County issued, returnable on the third Monday of May, 1871. 1871, May 15, continued to 22d instant, fourth Monday. 1871, May 22, assignment of errors filed; same day writ of error returned with record from the court of common pleas of Dauphin County, and filed. And now, to wit, May 22, 1871, this cause came on to be *be* heard, and on due consideration it is ordered that the judgment of the court below be affirmed, the court being of the opinion that the eighth section of the act of the general assembly of the Commonwealth of Pennsylvania, approved the 1st day of May, 1868, entitled "An act to revise, amend, and consolidate the several laws taxing corporations, brokers, and bankers," in its application to the gross receipts of the plaintiff in error, for the recovery
39 of the tax on which suit was brought, is not in conflict with the clause of the Constitution of the United States which provides that the "Congress shall have power to regulate commerce with foreign nations, among the several States, and with the Indian tribes," nor with that clause which provides that "no State shall, without the consent of the Congress, pay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws," and in all respects is constitutional and valid.

Per curiam.

JOHN M. READ, J.

1871, June 16, writ of error from the Supreme Court of the United States allowed by Hon. W. Strong, one of the justices of the said Supreme Court, bond in the sum of ten thousand dollars approved by Hon. W. Strong, j., and citation to defendant in error received and filed. Same day copy of writ of error for defendant in error received. Same day service of citation accepted by J. M. McClure, esq., for Hon. F. Carroll Brewster, attorney-general, with the same effect as if service within ten days of judgment, & copy of writ of error delivered to him.

SEAL OF SUPREME C'T OF PA., MID. DIS'T.

Certified from the record,
Harrisburg, Pa., Nov. 14, 1871.
ROB'T SNODGRASS,
Prothonotary.

40 And now, here, on this day, June 16, 1871, the said The Buffalo and Erie Railroad Company produced to the said supreme court of Pennsylvania, here, the writ of the United States of America, for the correcting of errors of and upon the premises, commanding the record and proceeding aforesaid of the judgment aforesaid, so as aforesaid rendered, with all things concerning the same, to be transmitted to the Supreme Court of the United States, to be held at the city of Washington, on the first Monday in December next, which writ of error is in the words and of the tenor following, to wit:

41 United States of America, eastern district of Pennsylvania.

The President of the United States to the judges of the supreme court of the State of Pennsylvania, being the highest court of law or equity in said State, greeting:

Because that in the record and process, and also in the rendition of judgment in a suit before you between the Buffalo and Erie Railroad Company, a corporation of the State of Pennsylvania, plaintiff in error, and the Commonwealth of Pennsylvania, defendant in error, (said suit being No. 107, of May term, 1871, of the middle district of said supreme court of Pennsylvania,) in which said suit the validity of a statute of the State of Pennsylvania, on the ground of repugnancy to the Constitution of the United States, is said to have been drawn in question, and the decision to have been in favor of the validity of the said stat-
42 ute, a manifest error hath happened, to the great damage of the said plaintiff in error, as in their complaint hath been alleged; and as it is just and proper that the error, if any there be, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, we do command you, if judgment be therein given, that then, and under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the first Monday of December next in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States ought to be done.

43 Witness the honorable Salmon P. Chase, Chief Justice of the Supreme Court, the tenth day of June, in the year of our Lord one thousand eight hundred and seventy-one, and the 95th year of the Independence of the United States.

[SEAL.] W. GRIER HIBLER,
Pro. Clerk Circuit Court U. S., E. D. of Pa.

Allowed by Wm. Strong, one of the justices of the Supreme Court U. S.

(Endorsed:) No. 107. May term, 1871. Sup. c't mid. dist. Pa. The Buffalo & Erie Railroad Company, plaintiff in error, vs. The Commonwealth of Pennsylvania. Writ of error. U. S. Supreme Court. Filed in the office of the prothonotary of the supreme of Pa. for the middle district and copy of writ of error for att'y-gen'l received June 16, 1871.

ROB'T SNODGRASS,
Prothonotary.

(Indorsed:) 107. May term, 1871. S. C. mid. dist. Pa. The Buffalo & Erie Railroad Company, plaintiff in error, vs. The Commonwealth of Pennsylvania. Writ of error. U. S. Supreme Court. Filed in the office of the prothonotary of the supreme court of Pa. for the middle district & copy of writ of error for att'y-general received June 16, 1871.

ROB'T SNODGRASS, *Proth'y.*

44 In pursuance whereof, and according to the form and effect of the act of Congress in such case made and provided, a tran-

script of the record and proceedings of the judgment aforesaid, so as aforesaid rendered, with all things relating to the same, together with the said writ of error, are hereby transmitted to the said Supreme Court accordingly.

Writ of error bond.

Supreme Court of the United States.

THE BUFFALO AND ERIE RAILROAD COMPANY, plaintiff in error,
vs.
THE COMMONWEALTH OF PENNSYLVANIA, defendant in error.

Know all men by these presents that we, The Buffalo & Erie Railroad Company, now the Lake Shore & Michigan Southern Railway Company, and S. Witt and A. Stone, jr., both of the city of Cleveland and State of Ohio, are held and firmly bound unto the Commonwealth of Pennsylvania in the sum of ten thousand dollars, to be paid to the said Commonwealth of Pennsylvania, her certain attorney or assigns, to which payment well and truly to be made we bind ourselves and each of us jointly and severally, and our and each of our successors, heirs, executors, and administrators, firmly by these presents, sealed with our seals and dated this 26th day of May, A. D. 1871.

Whereas the above-named The Buffalo and Erie Railroad Company, now the Lake Shore and Michigan Southern Railway Company,
45 hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the supreme court of the State of Pennsylvania, being the highest court of law and equity in said State: Now, therefore, the conditions of this obligation *is* such that if the above-named The Buffalo and Erie Railroad Company, now the Lake Shore and Michigan Southern Railway Company, shall prosecute their said writ of error with effect, and answer all damages and costs if they shall fail to make good their plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

The Lake Shore & Michigan Southern Railway Company,
{ SEAL OF LAKE SHORE & MICH. SOUTHERN RAILWAY CO. } By GEO. B. ELY, *Secretary.*

[SEAL.] S. WITT.
[SEAL.] A. STONE, JR.

Sealed and delivered in the presence of—
Witness:
N. BARTLETT.

NORTHERN DISTRICT OF OHIO, *ss:*

I, Charles I. Sherman, district judge of the United States within and for said district, do hereby certify that I am well acquainted with the above-named Stillman Witt and Amasa Stone, jr., obligors and sureties in the foregoing bond, and that each of the said Stillman Witt and Amasa Stone, jr., are worth the sum of ten thousand dollars over and above their several debts and liabilities.

CHARLES I. SHERMAN,
Judge, &c.

(Endorsed:) June 10, 1871. Bond & sureties approved. W. Strong, J. S. C. U. S.

Filed in the office of the prothonotary of the supreme court of Pa. for the middle district June 16, 187 .

ROB'T SNODGRASS,
Prothonotary.

46 The United States of America to the State of Pennsylvania, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, on the first Monday of December next, pursuant to a writ of error issued from the Supreme Court of the United States to the supreme court of Pennsylvania, wherein the Buffalo and Erie Railroad Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment against the said plaintiff in error, in a suit No. 107 of May term, 1871, of the supreme court of Pennsylvania for the middle district of said State, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the honorable William Strong, associate justice of the Supreme Court of the United States, this tenth day of June, A. D., 1871.

[SEAL.] W. STRONG, *J.*

I hereby accept service of the within citation with the same effect as if served within ten days from the entry of judgment.

J. M. McCLURE,
For F. CARROLL BREWSTER,
Attorney-General.

HARRISBURG, *June* 16, 1871.

(Indorsed:) No. 107, May term 1871. S. C. Mid. Dis't Pa. The Buffalo & Erie Railroad Company, plaintiff in error, vs. The Commonwealth of Pennsylvania. Citation. Filed in the prothonotary's office of the supreme court of Penn'a for the middle dist., June 16, 1871. R. Snodgrass, Proth'y.

47 MIDDLE DISTRICT OF PENNSYLVANIA, *ss:*

In testimony that the foregoing, contained on pages one to forty-seven, inclusive, is a full, true, and complete copy of the record and proceedings of the supreme court of Pennsylvania, the highest court of law and equity in the State of Pennsylvania, in the case lately depending therein to No. 107 of the May term, 1871, middle district, wherein The Buffalo and Erie Railroad Company was plaintiff in error and the Commonwealth of Pennsylvania was defendant in error, I have hereunto subscribed my name and affixed the seal of the said supreme court, in and for the said district, at Harrisburg, this 14th day of November, A. D. one thousand eight hundred and seventy-one.

[L. S.] ROB'T SNODGRASS,
Proth'y Sup. C't of P'a, Middle District.

(Indorsement on cover:) No. 368. The Buffalo and Erie Railroad Company, plaintiffs in error, vs. The Commonwealth of Pennsylvania. Pennsylvania Sup. Ct. Filed 13th December, 1872.